IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d b a LEA COUNTY PUBLISHING CO., AND PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE APPELLANTS

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OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico (R. 43-52) is reported at 70 N.M. 90, 370 P. 2d 811 (1962). The oral ruling *per* Judge Brand, in the District Court of Lea County, State of New Mexico (R. 28) and the District Court's decision (findings of fact and conclusions of law) (R. 18-20), and final decree (R. 20-21) have not been officially reported.

JURISDICTION

The final judgment of the Supreme Court of the State of New Mexico (R. 52-53) was entered on April 11, 1962. Appellants' notice of appeal (R. 54-57) was filed on July 6,

1962 and this Court noted probable jurisdiction on November 13, 1962 (R. 57). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

QUESTIONS PRESENTED

Whether Section 67-7-13 of New Mexico Statutes Annotated, 1953 Compilation (hereinafter cited as "N.M.S.A., 1953"), as applied to appellants, residents of New Mexico who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a radio station, respectively, having circulation and broadcast coverage in both New Mexico and states other than New Mexico, in prohibiting, and the action of the New Mexico courts thereunder enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eyeglasses, lenses and frames and services relating thereto by a resident of the State of Texas practicing optometry and offering such advertised articles and services for sale only in the State of Texas, is:

(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, Clause 3;

(2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws;

(3) as to appellant Permian Basin Radio Corporation, unconstitutional under Article VI, Clause 2, of the United States Constitution by reason of the preemption of the Federal Communications Act.[1]

[1] While the question of possible preemption was raised in Appellants' Jurisdictional Statement (p. 15) as related to the question of the burden of New Mexico's action upon interstate commerce, the question was not separately stated among the

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States: Article I, Section 8, Clause 3; Article VI, Clause 2; Fourteenth Amendment, Section 1.

Section 67-7-13, N.M.S.A., 1953, which is reprinted in Appendix A hereto; and the Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151, et seq., relevant provisions of which are printed in Appendix B hereto.

STATEMENT

The Parties

Appellant Agnes K. Head (hereinafter called "Head") (a defendant below) is a resident of Hobbs, Lea County, New Mexico, where she does business as Lea County Publishing Company, publishing a newspaper called the "Hobbs Flare" (R. 2, 18, 28, 44-45). In addition to its circulation in New Mexico, this newspaper has circulation in thirteen states and the District of Columbia, including circulation in some twenty-seven communities in the State of Texas (Appellant Head Ex. C., R. 29-30, 37). Appellant Permian Basin Radio Corporation (hereinafter called "Permian") (also a defendant below), a corporation, owns and operates in Hobbs, Lea County, New Mexico, Radio Station KHOB, having broadcast coverage in New Mexico and Texas. It

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questions presented by this appeal either in Appellants' Notice of Appeal (R. 56-57) or the Jurisdictional Statement (p. 2-3). This Court's order noting probable jurisdiction (R. 57), stated:

> "The statement of jursdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. In addition to the questions listed in the jurisdictional statement, the parties are requested to address themselves to the issue of possible federal preemption by reason of the Federal Communications Act. The Solicitor General is also invited to express the views of the Federal Communications Commisson on this issue."

As Appellant Agnes K. Head is not engaged in radio broadcasting, this question will be discussed only with respect to Appellant Permian Basin Radio Corporation.

receives news coverage from certain cities in Texas and broadcasts advertising from national advertising concerns and for firms and merchants situated in Texas (R. 2, 18, 27-28; Appellant Permian Ex. 1, R. 38-39; R. 44-45).

Appellee is an agency of the State of New Mexico and is charged with the administration of New Mexico's laws (Sections 67-7-1 through 67-7-14, N.M.S.A., 1953) relating to the practice of optometry (R. 2. 18-19).

Also defendants below, but not parties to this appeal, were Abner Roberts (hereinafter called "Roberts"), an optometrist residing and practicing optometry in Gaines County, Texas, just across the Texas-New Mexico border and a few miles east of Hobbs, New Mexico, and KWEW, Inc. (hereinafter called "KWEW"), the operator in Hobbs, New Mexico of Radio Station KWEW. (R. 18, 28, 44-45)

The Litigation

In September 1960, Appellee commenced an action in the District Court of Lea County, New Mexico, against Appellants Head and Permian, and the other Defendants Roberts and KWEW, seeking to enjoin Appellants Head and Permian and KWEW from accepting and publishing and broadcasting in New Mexico certain advertising by Roberts, which quoted prices or discounts on eyeglasses in alleged violation of Section 67-7-13, N.M.S.A., 1953 (R. 1-3). Roberts did not appear, although he was apparently served with process in Texas, and on January 4, 1961 the District Court entered a decree enjoining him from price advertising eyeglasses in New Mexico (R. 9-10). A copy of this decree was served on Roberts in Texas on January 20, 1961 (R. 12).

Appellants Head and Permian and KWEW appeared in the action and in their answers they raised, among others, the same defenses as are now presented on this appeal (R. 4-15).

Following appellee's motion for summary judgment, the matter was heard by the District Court on January 19, 1961. The evidence presented consisted of certain stipulations, including stipulations that appellants Head and Permian

and KWEW had accepted price advertising from Roberts by telephone, and would continue to do so unless enjoined by the court. In announcing its ruling that an injunction would issue as prayed, the District Court stated that Roberts was a non-resident of New Mexico and, beyond the jurisdiction of that court, that his activities could not be controlled by the court, and that Texas had no such act as appellee sought to enforce. However, the District Court further stated that Roberts' acts were illegal and that the other defendants were engaged in a conspiracy to assist him and should be restrained (R. 28).

Accordingly, on March 28, 1961 the District Court rendered its formal decision (finding of fact and conclusions of law) (R. 18-20), and on April 7, 1961 the District Court filed its final decree perpetually enjoining and restraining appellants Head and Permian and KWEW "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import, as prohibited by the provisions of Section 67-7-13 (m), 1953 Compilation. . ." (R. 20-21).

Appellants Head and Permian and KWEW appealed the decision of the District Court to the New Mexico Supreme Court (R. 22-23), raising before that court the same defenses under the United States Constitution as had been raised below (R. 44-52). Roberts, not having appeared, did not appeal. The New Mexico Supreme Court, after written briefs and oral argument were presented, affirmed the District Court on April 11, 1962 (R. 52-53).

Appellants Head and Permian filed their notice of appeal of that decision to this Court with the Clerk of the Supreme Court of New Mexico on July 6, 1962 (R. 54-57). KWEW has apparently not appealed that decision.

SUMMARY OF ARGUMENT

The state court erred in considering the enjoining of appellants as a permissible regulation of matters of purely

local concern. Appellants are engaged in interstate commerce and their dissemination of price advertising of a Texas optometrist was part of that commerce. New Mexico in effect is attempting to regulate not a local matter but the practice of optometry in Texas. The clear effect of this restraint, which prevents the business of New Mexico and Texas residents from flowing to Roberts and prevents Roberts' advertising from flowing to appellants, constitutes an unreasonable burden on interstate commerce in violation of the Commerce Clause. It opens the door to widespread rivalries among States and appellants submit, should not be sanctioned. See e.g. *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511 (1935).

The state's action is all the more unprotected so far as it relates to appellant Permian, a radio station operator, for by the Federal Communications Act Congress has so fully occupied the field of regulation of radio as to preempt the area from state regulation. This Act meets all of the three separate standards by which preemption is normally tested, *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502-505 (1956): The Act itself establishes a comprehensive scheme of federal regulation and the courts and Federal Communications Commission have so construed the Act; the federal interest must be dominant to that of the states because of the number of radio facilities which may be operated and the inherent interstate nature of radio broadcasting; and there is already a serious conflict between the provisions of the Act and New Mexico's regulation of Permian, and similar potential conflicts attend any similar state regulation of broadcasting. See e.g. *Federal Communications Commission* v. *Pottsville*, 309 U.S. 134 (1940). While there is an undoubted area in which states may regulate broadcasters despite the federal preemption, we submit that the injunction in question does not fall within that permissible area. See *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586 (1950).

As to both appellants New Mexico's action constitutes an invalid previous restraint on their publishing and broadcasting. As such it deprives them of their property with-

out due process of law in violation of the Fourteenth Amendment. The matter they have been prevented from disseminating is, admittedly, commercial advertising. But appellants submit that such advertising is entitled to Constitutional protection. The prior cases of this Court according less protection to commercial matter should not control a case such as this, which involves communications media disseminating both non-commercial and commercial material. See e.g. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936; cf. *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

Appellants also urge that aside from the previous restraint aspect of the injunction, New Mexico's objective of protecting its citizens' eyesight does not justify prohibiting appellants from disseminating price advertising of a Texas optometrist. The extension of the New Mexico law to cover that advertising is wholly unjustified and unreasonable and its effect is to deprive appellants of their property without due process. See *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934); *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

Finally, as to appellant Head, an individual, the injunction in question deprives her of her right to engage in interstate commerce and as such deprives her of her privileges and immunities as a citizen of the United States. See *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

ARGUMENT

I

Section 67-7-13 of N.M.S.A., 1953, as applied by the Supreme Court of the State of New Mexico in restraining appellants from publishing and broadcasting price advertising of an optometrist residing and practicing optometry in Texas, is unconstitutional as an undue and unreasonable burden upon interstate commerce.

In affirming the judgment of the lower court in enjoining appellants, the New Mexico Supreme Court concluded that:

> "As we construe Section 67-7-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by 'any person' and 'by any means.' Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants." (R. 50)

As this portion of its opinion indicates, the state court proceeded from the premise that prohibiting advertising the price of an article of commerce was a permissible regulation under the state's police power, even though total prohibition of all advertising might not be. Other portions of its opinion bear this out. Thus, on this same question the court also stated that:

> "We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of *all* advertising relating to a commodity moving in interstate commerce into its state from another state for legal sale in its original package, . . ." (emphasis the court's) (R. 46)

In addition, in discussing appellant's contention that the state's action deprived them of property without due process, the court concluded that the case of *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959 (1927) "is not in point since we are not dealing here with the prohibition of advertising but a

reasonable police regulation of the manner in which the advertising can be done in this state." (R. 51)

We submit that the New Mexico court's action and the statute in question cannot be so simply justified.

Roberts is an optometrist residing and practicing in Texas, a few miles from Hobbs, New Mexico, where appellant Head publishes the Hobbs Flare and appellant Permian operates KHOB. In an effort to attract patients he advertised, via appellants' media, the prices at which he would fit glasses.[2] Some of the patients he could hope to attract would undoubtedly reside in New Mexico. But New Mexico residents are not the only patients he could hope to attract. Appellant Head's newspaper has circulation in thirteen other states and, more importantly, in some twenty-six Texas communities in the immediate trade territory (R. 37). Similarly, appellant Permian's radio station has considerable broadcast coverage in Texas,[3] in many of these same communities (R. 38-39).

The distinction the New Mexico court seeks to draw between a total prohibition against advertising and a mere regulation of the manner of advertising through prohibiting the price at which advertised, is wholly unsupportable. Obviously, one would not expect residents of New Mexico who live in or near Hobbs, or such nearby communities as Lovington or Eunice to travel across the state line to

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[2] As the New Mexico District Court found, Texas has no statute prohibiting the price advertising of eyeglasses. (R. 28). A Texas statute does prohibit the publishing of "any statement or advertisement concerning opthalmic lenses, frames, eye-glasses, spectacles or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impresssion, including statements or advertisments of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning." (Vernon's Texas Civil Statutes, Art. 4565g). No claim is made here that Roberts' advertising was in any way fraudulent, deceitful or misleading, and no such issue is before the Court.

[3] Indeed, because Hobbs is located in the Southeast corner of New Mexico, an even greater portion of appellant Permian's broadcast coverage would appear to be in Texas (R. 38-39).

have their eyeglasses fitted by Roberts unless they knew in advance that the prices at which Roberts fits eyeglasses were competitive with or lower than the prices charged by local optometrists. The same would reasonably be true as to residents of Texas who live in or near such communities as Seagraves, Seminole, or Andrews.

The effect of the state court's action, therefore, is not only to prevent residents of New Mexico from learning at what price Roberts will fit eyeglasses, but to prevent Texas residents from obtaining this information. Not knowing this price, they are effectively foreclosed from doing business with Roberts. We submit that no clearer burden on interstate commerce could be presented. Having been enjoined by the New Mexico courts, appellants are as much the victims of that burden as Roberts.

As this Court pointed out so vividly in *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511 (1935), it was the purpose of the commerce clause[4] to prevent this sort of burden on commerce among the several states. In that case, in holding that New York could not regulate the price paid milk producers in Vermont by prohibiting the sale in New York of milk acquired from Vermont where the price paid the Vermont producers was less than would be owing to New York producers, the Court stated:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, Sec. 10, clause 2; *Woodruff* v. *Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress.

[4] United States Constitution, Article I, Section 8, clause 3: "The Congress shall have Power. . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Constitution, Art. I, Sec. 8, clause 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co. v. Pigg*, 217 U.S. 91, 112; and see *Brennan v. Titusville*, 153 U.S. 289; *Brown v. Houston*, 114 U.S. 622; *Webber v. Virginia*, 103 U.S. 344, 351; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, Sec. 259. "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U.S. 511, 521-522.

A. The advertising which appellants have been enjoined from publishing or broadcasting is itself a part of interstate commerce.

It should be noted initially that the wisdom of the New Mexico statute regulating the practice of optometry is not here in question, for in *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955), this Court upheld an Oklahoma statute regulating the practice of optometry and restricting advertising by optometrists. There are significant differences between that case and appellants' case. The Oklahoma statute restricted only advertising by optometrists and had a specific proviso to the effect that the Act should not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor

(348 U. S. 483, 488, n 2). Moreover, the complaining parties were Oklahoma residents complaining about the effect of the statute in Oklahoma and no issue of interstate commerce was involved or considered.[5]

But there is a fundamental issue of interstate commerce involved in appellants' case. Appellants are engaged in interstate commerce and the very advertising they have been enjoined from disseminating is a part of that commerce. *Lorain Journal* v. *U. S.*, 342 U. S. 143 (1951); *Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268 (1934); *Scripps-Howard-Radio* v. *Federal Communications Commission*, 316 U. S. 4 (1942); *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 (1936).

B. Restrictions placed on the advertising of alcoholic beverages are not controlling as to other legitimate subjects of interstate commerce.

In holding that no undue burden on interstate commerce was here involved, the New Mexico Supreme Court stated that it was in agreement with the line of reasoning expressed in *State* v. *J. P. Bass Publishing Company*, 104 Me. 288, 71 Atl. 894 (1908). In that case the Supreme Court of Maine upheld the defendant's conviction for publishing in Maine an advertisement for the sale of intoxicating liquor placed by a firm in Massachusetts. In Maine the sale and advertising for sale of liquor was illegal, whereas in Massachusetts it was legal. Rejecting a defense based on the commerce clause, the Court affirmed the conviction on the basis of *Delamater* v. *South Dakota*, 205 U. S. 93 (1907). It considered that even if it could not prevent an out-of-state newspaper advertising liquor from coming into Maine, it could prevent such advertising by those within its own territory.

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[5] In the *Williamson* case the Court placed considerable reliance on *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935), in which the Court upheld as valid an Oregon statute providing that a dentist's license could be revoked for various advertising, including price advertising. No issue of interstate commerce was involved in that case, and there is a fundamental difference between prohibiting a licensed professional from advertising and prohibiting communications media such as here from disseminating advertising.

That case does not in the least support the restraint here imposed on appellants. Intoxicating liquor historically has been treated as a special category as regards the right of the states to regulate its flow in interstate commerce. This distinction was noted by this Court in *Delamater* v. *South Dakota*, *supra*, where the Court stated that, as the matter involved liquor, South Dakota's conviction of Delamater for soliciting liquor sales in South Dakota without a license did not require the Court to determine whether the restraints of the South Dakota statute would be a direct burden on interstate commerce if generally applied to subjects of commerce (205 U. S. 93, 97). Cases involving interstate commerce in liquor are not controlling authority as to other subjects of commerce, *Carter* v. *Virginia*, 321 U. S. 131 (1944), and the reliance of the New Mexico Supreme Court thereon is misplaced.

Other courts have reached results similar to those in the *Bass* case, *supra*. Thus, in *State* v. *State Capital Co.*, 24 Okla. 252, 103 Pac. 1021 (1909), it was held that Oklahoma could enjoin an Oklahoma newspaper from advertising intoxicating liquor for sale by a Kansas City, Missouri firm, and in *Advertiser Co.* v. *State*, 193 Ala. 418 69 So. 501 (1915), it was held that Alabama could enjoin similar advertising. Indeed, some courts have even gone further than the *Bass* case. In *State* v. *Davis*, 77 W. Va. 271, 87 S. E. 262 (1915), it was held that a Maryland resident who mailed a circular advertising liquor to West Virginia violated West Virginia's law prohibiting the advertising of liquor, and in *State* v. *Delaye*, 193 Ala. 500, 68 So. 993 (1915), Delaye, a newsdealer, was enjoined from selling an out-of-state newspaper which contained advertisements of liquor.

Not all cases have reached this result, however, even with respect to liquor. On the contrary, in *R. M. Rose Co.* v. *State*, 133 Ga. 353, 65 S. E. 770 (1909), the court concluded that despite the Wilson Act and the *Delamater* case, *supra*, Georgia could not, under its law prohibiting the sale or solicitation of the sale of liquor, punish a Tennessee resident who sent circulars soliciting such sales through the mails from Tennessee to Georgia. Cf. *State Board* v.

Young's Market Co., 299 U. S. 59 (1936). Moreover, in *State* v. *Davis; supra*, the court stated that prior to the Wilson Act the soliciting of orders by advertisement, if resulting in the sale of liquor located outside the state, would be protected from interference by the state as a part of interstate commerce.

As to articles of commerce other than liquor, however, the courts have been uniform. They have concluded that states may not prohibit the advertising in one state of articles legitimately for sale in another. The case most nearly analogous to our case is that of *State* v. *Salt Lake Tribune Pub. Co.*, 68 Utah 87, 249 Pac. 474 (1926). In that case the respondent published in Utah a newspaper having circulation in other states. The Supreme Court of Utah reversed the respondent's conviction for having published an advertisement for cigarettes in violation of a statute prohibiting such advertisement but allowing the sale of cigarettes upon proper licensing. The court held that the statute as applied constituted an undue interference with interstate commerce. In so holding the court distinguished *State* v. *J. P. Bass Publishing Company*, 104 Me. 288, 71 Atl. 894 (1908) because that decision was concerned with advertisements of liquor, which was not within the protection of the commerce clause, and relied instead on *Post Printing & Publishing Co.* v. *Brewster*, 246 Fed. 321 (D. Kan. 1917).[6]

In the latter case the United States District Court for Kansas held that a newspaper publisher who published in Missouri but circulated its papers in Kansas, could not be prohibited by Kansas from selling in Kansas papers con-

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[6] Compare *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959 (1927), where, under circumstances similar to those in the *Salt Lake Tribune* case, the Supreme Court of Kansas held that prohibiting Kansas newspapers from publishing advertising of cigarettes, which competing papers published outside of Kansas could publish, was unconstitutional as a denial of the due process, equal protection and privileges and immunities clauses of the United States Constitution. While the court discussed the *Salt Lake Tribune* case and the newspaper's contention that the Kansas act under attack unduly burdened interstate commerce, the court seemingly did not actually decide the case on that point.

taining cigarette advertisements. The advertising of cigarettes was lawful in Missouri but not in Kansas.

Therefore, even if Roberts were merely a merchant advertising a product other than liquor which he would send from Texas to New Mexico upon receipt of orders, we submit that the *Salt Lake Tribune* and *Post Printing* cases would be far sounder authority than that on which the New Mexico court relied, and, indeed, that even the *Bass* case and the other cited cases involving liquor are authority supporting appellants' position. For in such case, the articles of commerce would be legitimate articles of commerce,[7] and Roberts would be entitled to sell and appellants to advertise them for sale in interstate commerce.

C. New Mexico has no authority to legislate with regard to the practice of a Texas optometrist fitting eyeglasses in Texas.

Roberts is not, however, merely selling an item which he sends through the mails or otherwise from Texas to New Mexico. Rather, he is a Texas optometrist who fits eyeglasses in Texas, and as such his advertising via appellants' newspaper and radio station must clearly have as its object the inducing of both residents of Texas and New Mexico to come to his place of business in Texas for the purpose of being fitted. In view of this, to the extent that any of the foregoing cases hold that a state may prohibit advertising, they are even less apposite.

Other authorities of this Court uphold appellants' position. In *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511 (1935), cited earlier, this Court held that New York could not, as a condition to licensing him to sell milk in New York, compel a person to pay a minimum price set by New York for milk

[7] Compare *Clason* v. *Indiana*, 306 U. S. 439 (1939), in which this Court upheld Indiana's prohibition against transporting large dead animals out of Indiana on the ground that Indiana had not recognized dead horses as legitimate articles of commerce. No such consideration is involved here, for eyeglasses are clearly legitimate articles of trade. New Mexico's effort to regulate the advertising of the price thereof does not make them less so, especially where, as here, the eyeglasses are for sale by a Texas optometrist.

purchased in Vermont. The Court stated that the price to be paid producers in Vermont was Vermont's concern, not New York's, and that such a regulation was an undue burden on interstate commerce.

In that case, New York contended that its efforts to set the price of milk in Vermont were not aimed at the economic welfare of farmers, but at the maintenance of a regular and adequate supply of pure and wholesome milk (294 U. S. 511, 522-523). In rejecting any such contention, this Court stated:

> "Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.
>
> "We have dwelt up to this point upon the argument of the state that economic security for farmers in the milkshed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect

the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Hunt* v. *Baldwin*, 289 U.S. 346; *Reid* v. *Colorado*, 187 U.S. 137); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in other, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. *Schell* v. *Kansas*, 209 U.S. 251, 256; *Railroad Co.* v. *Husen*, 95 U.S. 465, 472. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy."

In effect, as here applied, New Mexico, by Section 67-7-13, N.M.S.A., 1953, is attempting objectives similar to those of New York in the *Baldwin* case, and under the same guise. Thus, the New Mexico Supreme Court stated that Section 67-7-13 was enacted by New Mexico "to protect its citizens against the evils of price advertising methods

tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." (R. 46). The question of whether this may be a legitimate objective as applied to New Mexico optometrists is not in issue in this case. What is in issue is whether the state of New Mexico may effectively prevent price advertising in interstate commerce by an optometrist residing and practicing in Texas, when such advertising is not prohibited in Texas. The *Baldwin* case suggests clearly that this latter objective is not legitimate and that the injunction should not stand.

D. The injunction has a direct and substantial effect on interstate commerce and may not be justified as an exercise of state police powers.

The New Mexico court considered that the statute in question was a valid exercise of the state's police power, and that the state was not wholly precluded from exercising its police power in such a matter of local concern, even though its exercise might indirectly affect interstate commerce. (R. 47)

The effect of New Mexico's enjoining appellants from carrying Roberts' price advertising, however, is far from indirect, as has been shown. The fact that it purports to have been accomplished as an exercise of the state's police power cannot justify the restraints in question. See *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918); *Baldwin* v. *G.A.F. Seelig, supra*, at p. 527.

Equally in point with the *Baldwin* case is the *Foster* case, *supra*. There the New York Stock Exchange contracted with Western Union to furnish it with stock quotations, which the latter in turn would furnish to various subscribers approved by the Exchange. The quotations were sent by the Exchange from New York to Boston, Massachusetts, where Western Union decoded them and relayed them by ticker to the subscribers. This Court held that the transmission of quotations remained in interstate commerce until completed in the subscribers' offices and that an order of the Massachusetts Public Service Commission requiring Western Union to cease discriminating against

a would-be subscriber disapproved by the Exchange was invalid as a direct interference with interstate commerce.

The analogy to our case is strong. When Roberts communicates advertisements to appellants, this is clearly interstate commerce. But the communication does not rest there, for the advertising is communicated to appellants for dissemination via their respective newspaper and radio station. This dissemination, too, is interstate commerce, no less in our case than in the *Foster* case, *supra*, and the burden on interstate commerce is as direct here as there.[8]

E. New Mexico may not prevent its residents from traveling to Texas to make purchases lawful in Texas.

As stated, in advertising with appellants, Roberts reaches not only residents of Texas and other states, but residents of New Mexico. Whatever may be the right of New Mexico to limit its residents' activities in New Mexico, it cannot limit their lawful activities in other states. As citizens of the United States, they have the clear and unobstructible right to purchase eyeglasses from Roberts in Texas. *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346 (1922). New Mexico, therefore, clearly could not prevent its residents from traveling between New Mexico and Texas for the lawful purpose of purchasing eyeglasses from Roberts. *Edwards* v. *California*, 314 U. S. 160 (1941). Yet the effect of its action is the same. By foreclosing from its residents advertising information as to articles legitimately for sale in Texas, New Mexico effectively prevents its residents

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[8] Compare *Nat* v. *Delaye*, 193 Ala. 500, 68 So. 993, (1915), cited *supra*, where the court upheld the enjoining of Delaye from selling out of state newspapers on the theory that once the newspapers had come into Alabama and were commingled with the mass of property in the state, they were not in the "original package" and were subject to Alabama's laws. Compare also *Parker* v. *Brown*, 317 U. S. 341 (1943), where this Court held that California's marketing program for California grown raisins was local regulation of interstate business even though such regulation had the effect of preventing commerce in raisins.

from traveling to Texas for that purpose almost as if they were prohibited by law from making such purchases. This too unduly burdens[9] interstate commerce and appellants are again among the victims of that burden.

F. The validation of restrictions such as here imposed would open the door to widespread limitations on advertising in interstate commerce.

Appellants are not unaware of the many cases in which this Court has upheld state action affecting interstate commerce. See *California* v. *Thompson*, 313 U. S., 109, 113 (1941); *DiSanto* v. *Pennsylvania*, 273 U. S. 34, 40 (1927). We submit that those cases are not controlling. This is not a matter of mere local concern to the state of New Mexico. New Mexico is not alone in enacting statutes prohibiting various types of advertising, although it has its fair share. Other states, including Texas, have similar statutes,[10] and this fact emphasizes the importance of the issue of whether one state can lawfully restrict advertising with advertising media normally engaged in serving not only that state but other states whose laws may be different and into which residents of the former may travel for commercial purposes. If New Mexico can validly restrict appellants' publishing and broadcasting of price advertisements on eyeglasses, then it surely can as easily restrict their dissemination of advertising placed by non-residents but within the literal proscriptions of the other statutes.

If every state could thus restrict advertising by non-residents with media having interstate circulation or coverage, the disruption to interstate commerce would be great and far reaching. This genuinely potential disruption should not be sanctioned by this Court.

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[9] See also *Hood & Sons* v. *DuMond*, 336 U. S. 525 (1949); *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); *Schollenberger* v. *Pennsylvania*, 171 U. S. 1 (1898). Compare *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 197 F. Supp. 780 (N.D. Cal., 1961), probable jurisdiction noted 368 U. S. 964 (1962).

[10] For a comprehensive collection of various state statutes on advertising, see the Appendix of Note, *The Regulation of Advertising*, 56 Col. L. Rev. 1018, 1097-1111.

II

By the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. Sections 151, et seq., Congress occupied the field of regulation of radio broadcasting in its entirety, and New Mexico's enjoining of appellant Permian from broadcasting prices advertising of a Texas optometrist is an invalid incursion into an area reserved for federal regulation.

As this Court indicated in *Pennsylvania* v. *Nelson*, 350 U. S. 497, 502-505 (1956), there are three basic standards by which it is determined whether a federal scheme of regulation covers an area of activity so completely as to preempt it and thereby preclude state regulation in the same area: (1) is the scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for supplemental state regulation; (2) is there a federal interest in the area so dominant as to preclude state regulation in the same area; or (3) does regulation by the state present a danger of conflict with federal regulation?

Applying essentially these standards this Court has concluded that federal regulation preempted such diverse areas as internal subversion, *Pennsylvania* v. *Nelson*, *supra*; collective bargaining, *Hill* v. *Florida*, 325 U. S. 538 (1945); alien registration, *Hines* v. *Davidowitz*, 312 U. S. 52 (1941); and carrier liability for damage, *Charleston & Western Carolina Railway Co.* v. *Varnville Co.*, 237 U. S. 597 (1915).

On the other hand, the Court has reached an opposite result in such equally diverse areas as control of emission of smoke by vessels, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960), and regulation of customhouse brokers, *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944).

Seemingly more in point here, perhaps, than any of the foregoing are the cases of *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27 (1919), and *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315 (1920). In *Postal Telegraph* the Court held that by the Act of June 18, 1910, c. 309, 36 Stat. 539, 545, Congress had preempted the field of regulation of the interstate business of telegraph

companies so that the validity of contracts for rates of messages was not determinable by state law. In the *Boegli* case the Court held that the same Act brought telegraph companies under administrative control of the Interstate Commerce Commission and so subjected them to a uniform national rule as to preclude the states from inflicting penalties for failure to make prompt delivery of interstate messages. However, as broadcasters are not common carriers, 47 U. S. C. §153 (h) (1958); *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940), these cases are not, in fact, more pertinent than the other cited cases which have found federal preemption.

A. Regulation of the contents of broadcasters' programs, both with regard to advertising and other matters, has been fully occupied by Congress under the Communications Act.

The case most closely in point is clearly that of *Allan B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (3rd Cir., 1950), cert. den. 340 U. S. 929 (1951). In that case Dumont sued the Pennsylvania State Board of Censors, which by a regulation required that all motion pictures to be shown on television in Pennsylvania be submitted to the Board, for a declaratory judgment that the regulation was invalid. In holding the regulation invalid [11] the court concluded that the area of television communication had been fully occupied by Congress under the Communications Act so that the field was no longer open to the states.[12]

We submit that there are no significant differences between the *Dumont* case and that of appellant Permian.

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[11] *Times Film Corp.* v. *Chicago*, 365 U. S. 43 (1961), upholding Chicago's ordinance compelling submission of motion pictures for examination prior to their exhibition, should not compel a contrary conclusion. Aside from the area of free speech and press, it is clear that there is no comprehensive federal regulation of the motion picture industry.

[12] It should be noted that the District Court in the *Dumont* case, 86 F. Supp. 813, 816 (E.D. Pa. 1949), concluded that the state regulation in question was invalid not only because of the preemption of the field by Congress, but also because "it would constitute an undue and unreasonable burden on interstate commerce in television broadcasting." We submit that this conclusion is correct.

Both cases, in effect, involve regulation by a state of the content of a broadcaster's program. The regulation in *Dumont* would have compelled the submission of motion pictures for possible censorship, but the injunction in this case already has had the effect of censorship. Moreover, that the censorship in this case may relate to commercial advertising [13] does not justify any different treatment, for if Congress has preempted the field of regulation of broadcasting, as we believe it has, it clearly has done so just as much in respect of the advertising content of broadcast programs as in respect of other content.

B. Neither the Federal Communications Commission nor the States may exercise the power of censorship over broadcasters.

It is true that the Communications Act does not give unlimited powers to the Federal Communications Commission and that in fact 47 U. S. C. §326 (1958) specifically withholds from the Commission any power "of censorship over radio communications" and provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." But just as this was thought by the Court of Appeals in the *Dumont* case not to justify Pennsylvania's attempted regulation, so the same result should obtain here. There, in considering this question, the Court of Appeals stated:

> "We cannot agree with the contention of the Board of Censors that censorship by the States is permitted under the Act. While Section 326, 47 U.S. C.A. §326, declares it to be a national policy that nothing in the Act shall be understood to give the Federal Commission 'power of censorship' over radio communications and that no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication', this does not mean that the States may exercise a censorship specifically denied to the Federal agency. Censorship may be defined as 'the forbidding of publication, i.e. prohibition of publication in advance

[13] Compare *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942).

> of publication. The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case." (184 F. 2d 153, 156).

The foregoing is clear and ample support for the position of appellant Permian that New Mexico's enjoining it from broadcasting Roberts' price advertising represents an unwarranted and invalid incursion by New Mexico into an area fully preempted by Congress by the Communications Act. In this regard, while the *Dumont* case did not expressly articulate all of the three foregoing standards by which preemption may be determined, it is clear that Congress' regulation of broadcasting by the Communications Act meets all three tests of supersession.

C. Congress has provided a comprehensive scheme of regulation of broadcasting under the Communications Act.

As to the first test, namely, whether there is a comprehensive regulation scheme by Congress in the area of broadcasting, the answer must be affirmative. The provisions of the Communications Act of 1934 (herein called the "Communications Act"), 48 Stat. 1064, 47 U. S. C. Secs. 151 et seq. (1958), themselves reveal the comprehensive scope of Congress' regulation of the interstate transmission of radio waves. They represent such a comprehensive occupation of the field of interstate radio communication by Congress as to constitute a complete preemption of the area attempted to be regulated by New Mexico in prohibiting appellant from broadcasting from New Mexico, but in interstate commerce, advertising of a Texas optometrist.

That the Communications Act speaks in general terms is true. Nevertheless, this Court and lower federal courts time and again have emphasized its comprehensive scope.

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), speaking of the Communications Act, this Court stated:

> "In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry." (p. 137)

Later, in *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943), speaking of the Commission's powers under the Communications Act, the Court stated:

> "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission." (pp. 215-216)

See also *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 6 (1942) ("The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio."); *Benanti* v. *U.S.*, 355 U.S. 96, 104 (1957) ("The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication"); *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (3rd Cir., 1950), cert. den. 340 U.S. 929 (1951) ("We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States."); *Lamb* v. *Sutton*, 164 F. Supp. 928,

934 (M.D., Tenn., 1958), aff'd 274 F. 2d. 705 (6th Cir., 1960), cert. den. 363 U.S. 830 (1960) ("... Congress under the Federal Communications Act of 1934, as amended, completely occupied and preempted the field of interstate communications in radio and television ...").

There are, of course, other cases in which this Court has indicated that the regulatory scheme may be less comprehensive than the foregoing quoted statements suggest. In *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), decided the same term as the *Poffsville* case, *supra*, this Court stated as follows, at page 475:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

The content of this statement, however, is such that it does not detract from the Court's other statements as to the broad scope of the Communications Act. All the Court was there saying, we submit, is that unlike communications by telephone and telegraph, the Act did not give the Commission the power to regulate broadcasters as if they were common carriers and that not having given the Commission such power the Commission, in effect, owed no duty to a licensee to protect it from the adverse effects of economic competition. That broadcasters are not common carriers is clear even from the Act itself, 47 U.S.C. § 153 (h) (1958), and this statement is surely compatible with the foregoing statements.

Similarly, in *U.S.* v. *Radio Corporation of America*, 358 U.S. 334, 350 (1959), the Court stated that "there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief." But there, too, the Court was speaking of the absence of regulation of the character of common

carrier regulation, which absence justified holding that the Federal Communications Commission need not have primary jurisdiction over antitrust matters as they concerned broadcasters.

Overall, in the face of these characterizations[14] of the comprehensiveness of the regulatory scheme of the Communications Act, we submit there is no question but that that regulation is so comprehensive as to preempt the field of broadcast regulation so completely that the action challenged by appellant Permian in this appeal may not stand.

Aside from the fact that the Communications Act forbids censorship by the Commission, past interpretations of the Act attest that the Commission nevertheless has extensive powers with respect to the content of broadcast programs. Under the Act the Commission is responsible for licensing radio broadcasters. In exercising this responsibility the Commission is guided by the standard of whether the "public convenience, interest or necessity will be served" in granting or renewing licenses.

Applying this standard, the Commission has clearly exercised a close supervisory control over broadcast programing, including control over even the advertising content of programs. For example, in *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. 2d 850 (D.C. Cir., 1932), cert. den. 284 U.S. 685 (1932), the present Commission's predecessor refused to renew the radio broadcasting license of a licensee who, it was found, had abused it by broadcasting defamatory and untrue matter, on the ground that the station was not being conducted in the public interest, convenience or necessity. Its action was upheld as within its powers, the court rejecting the contention that this sort of supervision constituted censorship. Similarly, in *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 47 F. 2d 670 (D.C. Cir., 1931), the court upheld the Commission's refusal to renew a radio station license because the station had been used primarily for broadcasts

[14] The legislative history of the Communications Act and its predecessor acts has been fully considered in the cases already cited, and no useful purpose would be served in further detailing such history at this point.

of what amounted to advertising by Dr. John R. Brinkley. The Commission had found that in effect the station was being operated in the personal interest of Dr. Brinkley and not in the interest of the public.

Later cases have reached similar conclusions. In *Bay State Beacon* v. *Federal Communications Commission*, 171 F. 2d 826 (D.C. Cir. 1948) the court held that in awarding licenses the Commission could properly consider the amount of time devoted to commercial programs. Similarly, in *Liberty Television, Inc.*, 30 F.C.C. 411 (1961), the Commission expressed its concern as to the advertising content of the programing of an applicant to whom it had denied a license. In doing so it quoted as follows from its *Report and Statement of Policy re En Banc Programing Inquiry* (FCC 60-970), released August 2, 1960: "With respect to advertising material the licensee had the added responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matters, and to avoid abuses in respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages."

Nor is the Commission concerned only with quantitative content of programs. For example, in *Capital Broadcasting Co.*, 12 F.C.C. 649 (1948) it considered whether the dissemination of horse racing information was contrary to the public interest, and in *Sam Morris*, 11 F.C.C. 197 (1946) the Commission considered the matter of advertising of intoxicating liquors and concluded that it was a controverted matter of substantial public importance.[15]

In view of the foregoing, the conclusion is inescapable that the Commission has such authority over the content, including advertising, of appellant Permian's broadcast programing that New Mexico may not regulate the same

[15] See also, for example, *McGlashan*, 2 F.C.C. 145, 152-153; *U. S. Broadcasting Corp.*, 2 F.C.C. 208, 217-221; *WSBC, Inc.*, 2 F.C.C. 293, 297; *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298, 301; *Hammond-Calumet Broadcasting Corp.*, 2 F.C.C. 321, 325; *May Seed and Nursery Co.*, 2 F.C.C. 550, 571. These cases, all decided between July 1, 1935 and June 30, 1936, vividly portray the Commission's regulation of the matter of the advertising content of broadcasting programs.

content by enjoining appellant from broadcasting particular advertising.

D. The Communications Act is predicated on recognition of the dominant federal interest in radio broadcasting.

As for the second standard for testing supersession, namely, whether there is a dominant federal interest, the Communications Act was passed because the nature of radio broadcasting demanded national regulation. Speaking of this, this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474 (1940), stated:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

In view of the nature of radio broadcasting, the federal interest must be dominant to any competing interests of the states. That this is so is even clearer in light of the considerations involved in testing whether the third standard for judging preemption has been met.

E. State regulation of broadcasting involves numerous actual and potential conflicts with federal regulation and must defer to the paramount federal interest.

The third standard suggested by the preemption cases is whether state regulation presents a danger of conflict with federal regulation. One example should suffice to show how real is such danger of conflict in this case.

The Communications Act requires that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. §307 (b) (1958). In making this distribution the Commission must take into account the needs of the various communities and States to be served. See *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 271, 285 (1933); *Simmons* v. *F.C.C.*, 169 F. 2d 670, 671 (D. C. Cir., 1948), cert. den. 335 U. S. 846 (1948).

In the case of appellant Permian, the Commission has granted it a broadcast license giving it broadcast coverage not only in New Mexico, but also in Texas. It is, then, the undoubted obligation of appellant Permian to serve broadcast listeners in Texas, as well as in New Mexico. Yet, despite the fact that price advertising of eyeglasses is not forbidden by Texas law and that Roberts is an optometrist residing and practicing in Texas, New Mexico has enjoined appellant Permian from broadcasting this advertising to listeners in Texas and New Mexico. By so doing, the State of New Mexico has unjustifiably interfered with its efforts to serve the community and area it was licensed to serve.

Other potential conflicts readily come to mind. Suppose Texas allowed the conduct of certain commercial activities on Sunday but that New Mexico did not. Would New Mexico be justified in prohibiting appellant Permian from advertising such activities, even though in Texas, on the theory, for example, that New Mexico under its police power may regulate what its citizens hear so as not to disturb their needed day of rest? If New Mexico may do so, may not Texas reciprocate, and may not all states do so? The answer must surely be no.

Further, the Communications Act provides that a broadcaster must announce any matter being paid for and also announce the name of the person paying. 47 U. S. C. §317 (1958). Assume that New Mexico prohibited all advertising of optometrists and construed this to restrain communications media from disseminating such advertising.

Assume also a network radio program originating in New York and sponsored by an association of optometrists. If a broadcaster in New Mexico wanted to broadcast the program he would be faced with two alternatives. If he broadcast the program with an announcement that it was paid for by the optometrists' association he would face a charge by New Mexico that he had violated its law. If he broadcast the program without the announcement of who paid for it he would face a charge of violating federal law and, possibly, a denial of renewal of his license for such violation. The dilemma of the broadcaster in such case would be real[16], and the conflict between federal and state regulation of the broadcaster equally real.

In light of the existing conflict between state and federal regulation of Permian's broadcast activities and the potential conflicts to be foreseen, we submit that the state regulation must defer to the paramount interest of federal regulation.

F. The New Mexico Court construed too narrowly the area preempted by the Communications Act and improperly permitted state legislation to impinge on this preempted area.

We do not, as we could not, claim that broadcasters are immune from any state regulation of their business activities. Thus, in *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586 (1950), the Federal Communications Commission renewed the Regents' license only after they repudiated a contract with respondents. The respond-

[16] It might be suggested that faced with such a dilemma the broadcaster should simply not broadcast the program at all. But compelling a broadcaster not to broadcast a program in order not to violate state law is in fact a species of regulation. Moreover, in *Farmers Union* v. *WDAY*, 360 U. S. 525 (1959), this Court rejected the possibility that a station might refuse to allow any candidate time for broadcasting and thereby avoid the dilemma presented in that case between the mandate under Section 315 of Title 47, U.S.C. that the broadcaster not censor candidate's statements and the danger of libel actions based on what the candidate says. We submit that this possibility should be rejected as a solution to appellant Permian's dilemma also.

ents sued in state court and recovered a judgment against the Regents. This Court held that the judgment did not contravene the Supremacy Clause[17].

In reaching this conclusion this Court relied on its earlier case of *Radio Station WOW, INC. v. Johnson*, 326 U. S. 120 (1945), which upheld the power of Nebraska to set aside a station transfer for fraud and to order a retransfer of the physical facilities to the transferor, even though the latter might not chose to seek a retransfer of the station license or the same might, on application for transfer, be denied.

Similarly, in *Kroeger v. Stahl*, 148 F. Supp. 403 (N. J., 1957), aff'd. 248 F. 2d 121 (3rd Cir., 1957), an action by a mobile land radio station operator to compel zoning authorities to cease interfering with his construction of a radio tower in a residentially zoned area, the court held that the zoning ordinance did not unduly interfere with interstate commerce or invade an area preempted from state regulation even though the operator did have a temporary permit from the Federal Communications Commission. Compare *People v. Framer*, 208 Misc. 236, 139 N. Y. S. 2d 331 (1954); *Philadelphia Retail Liquor Dealers Ass'n. v. Pennsylvania Liquor Control Board*, 360 Pa. 269, 62 A. 2d 53 (1948).

The area reserved to the states in regulating broadcasters does not include the area into which New Mexico has now intruded. This incursion, the state court found, was not preempted by the Communications Act. But the State Court considered that the extent of federal occupation of the field far too narrowly:

> "With respect to radio broadcasting, Congress has occupied the field by virtue of the Federal Communications Act of 1934. Regents of New Mexico v. Albuquerque Broadcasting Company, (CAA 10th Cir.), 158 F. 2d 900. The express underlying purpose of this

[17] United States Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the case of Allen B. Dumont Laboratories v. Carroll (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. *The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.*" (emphasis added) (R. 48-49)

We submit that all of the foregoing dispels any notion that the Communications Act is so limited, and any notion that the New Mexico may limit appellant Permian's right to broadcast price advertising of Roberts.

III

New Mexico's enjoining of appellants Head and Permian from disseminating the advertising of Roberts constitutes an unlawful prior restraint upon appellants' publishing and broadcasting; this abridgment is an unlawful denial to them of freedom of the press and constitutes a taking of their property in violation of Section 1 of the Fourteenth Amendment.

Two leading cases on the subject of freedom of the press are *Near* v. *Minnesota*, 283 U. S. 697 (1931) and *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936). In the *Near* case this Court held unconstitutional the enjoining of the publication of a newspaper charging neglect of duty and corruption on the part of officials of Minnesota. Reviewing the history of restraints on publication, the Court concluded that a "previous restraint" such as there attempted con-

stituted an infringement of the liberty[18] of the press guaranteed by the Fourteenth Amendment. 283 U. S. 697, 723.

In the *Grosjean* case the Court held unconstitutional a Louisiana statute imposing a license tax on owners of all newspapers for the privilege of selling or charging for advertisements and measured by a percentage of the gross receipts of such advertisements. The statute by its terms applied only to newspapers with at least a weekly circulation of 20,000 copies. The Court saw in this a deliberate attempt, under the guise of a tax, to limit the circulation of information to which the public is entitled. On the question of previous restraint the Court stated:

> "In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods." (297 U.S. 233, 249)

A. The injunction constitutes an invalid prior restraint on the dissemination of information.

We submit, that the *Grosjean and Near* cases are directly applicable to New Mexico's enjoining appellants from disseminating Roberts' price advertising.[19] Appellants have at all times freely admitted that they published and broadcast

[18] Appellants wish to point out that in challenging the action of appellee in the lower court they asserted that enjoining them would deprive them of their "property" without due process of law (R. 4-5, 8, 11, 14-15). Appellants are not attempting to advance at this stage of the proceeding another federal ground not presented to the New Mexico courts. We submit that freedom of the press is as truly a right of property as of liberty and that the matter of characterization should not control appellants' right to raise the issue.

[19] Compare *City of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A. 2d 111 (1958) where, on the basis of the *Grosjean* case, the Maryland Court of Appeals held unconstitutional two Baltimore taxes; one a levy on the gross receipts from the sale of advertising and the other a sales or excise tax on the sales price of such advertising. The court found that in effect most of the tax would fall on newspapers and broadcast media.

Roberts' price advertising. New Mexico did not attempt to punish them for what it conceived to be a violation of Section (67-7-13 N. M. S.A. Rather, just as in *Near v. Minnesota, supra*, they were enjoined. Just as in *Near*, they now have two choices. They can refrain from disseminating the price information to which New Mexico objects or they can disseminate such information and face citation for contempt of court.

We are aware that in *Lorain Journal v. U. S.*, 342 U. S. 143 (1951), the Court upheld the lower court's enjoining of a newspaper publisher found to have attempted to monopolize interstate commerce in violation of Section 2 of the Sherman Act. In answer to the publisher's contention that the injunction amounted to a prior restraint upon what it may publish, the Court stated:

> "We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a publisher what the law applies to others. The publisher may not accept or deny advertisements in an 'attempt to monopolize . . . any part of the trade or commerce among the several States. . . .' *Associated Press v. United States, supra*, at 6-7, 20; *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268. See also, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 192; *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184; *Associated Press v. Labor Board*, 301 U.S. 103. Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others." (at pp. 155-156)

The difference between that case and appellants' case is that in *Lorain Journal* only the use of the injunction was in issue, for it had already been found that the publisher had violated the Sherman Act. The applicability of the Sherman Act to the transactions in question was not in issue, nor was the constitutionality of such applicability. But in appellants' case the very statute under which New Mexico proceeded against appellants is in issue. As that statute has been applied to a transaction exempt from its scope under the commerce clause and upon other grounds, the effect of the injunction is clearly an invalid restraint.

Moreover, in *Lorain* the injunction was not an attempt to tell the publisher what character of advertising it could publish, only with what objective he could publish or refuse to publish advertising. But in this case the injunction tells appellants that they may not disseminate particular information.

Nor are any of the cases cited in the *Lorain Journal* case in point, for they involve questions of the applicability to publishers and the press of the antitrust, wage and hour and labor laws. Appellants do not claim any exemption from such regulation on the grounds of freedom of the press. They do claim that they may not, consistently with that freedom, be restrained as here attempted.

B. Price advertising may involve an informational as well as a commercial aspect and, as such, should be entitled to Constitutional protection.

We are also aware that the Court has not always extended to the dissemination of commercial advertising the same protection as extended to other information. Thus, in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), the Court held that Chrestensen's efforts to distribute a handbill advertising his submarine were not entitled to Constitutional protection:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." (at p. 54)

In other cases the Court has held or intimated the same. See *Breard* v. *City of Alexandria*, 341 U. S. 622, 642-643 (1951); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943). See also *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F. 2d, 735, 739 (2nd Cir., 1956); *Pollak* v. *Public Utilities Commission of the Dist. of Col.*, 191 F. 2d 450, 457 (D.C. Cir., 1951), rev'd other grounds 343 U. S. 451 (1952).

There is no doubt but that the advertising of the price of eyeglasses is commercial in nature. Certainly it is not of the same character as editorial opinion or reportage. Nevertheless, we submit that the foregoing cases are not decisive of the issue. Newspapers and radio stations are able to publish the considerable variety and quantum of news and other material they do publish because the cost of publishing and broadcasting is offset by advertising revenues. This much is implicit in the *Grosjean* case. We submit, therefore, that where, as here, there are involved communications media not purely commercial but disseminating both commercial and non-commercial material, the fact that the particular item in question may be commercial advertising does not foreclose Constitutional protection to otherwise protected rights or sanction that which, if directed towards purely non-commercial matter, would infringe on protected rights.

Moreover, advertisements themselves may be of a more or less commercial nature. For example, in *Hoffman* v. *Perucci*, 117 F. Supp. 38 (E.D. Pa., 1953) appeal dismissed 222 F. 2d 709 (3rd Cir., 1955), *U. S. ex rel May* v. *American Mach. Co.*, 116 F. Supp. 160 (E.D. Wash., 1953); *California* v. *American Automobile Ins. Co.*, 132 C.A. 2d, 317 282 P. 2d 559 (1955), cert. den. 350 U.S. 886 (1955), the courts had before them in contempt proceedings certain advertisements by insurance companies to the effect that awards in accident cases were too high, resulting in higher insurance rates. Quite clearly these advertisements were commercial, having as their objective the lowering of verdicts in insured accident cases. But they were not only commercial. They were also a protest against a condition which the insurance companies considered of serious public concern. As such, they should be entitled to Constitutional protection as much as a newspaper or broadcasting editorial on the same subject.[20]

Unlike the insurance companies in the foregoing cases price advertising of eyeglasses is not, in explicit terms, an

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[20] Compare the advertisement in *The New York Times Co.* v. *L. B. Sullivan*, Docket No. 600, as to which this Court granted certiorari this term. That such advertising is commercial is clear. That it is more than that is equally clear.

expression of opinion. Nevertheless, we submit that no such expression should be necessary in any exact terms. Thus, suppose New Mexico optometrists charged $150.00 minimum to fit ordinary eyeglasses. Would not Roberts' advertisements in the same trade area that he would fit eyeglasses for $25.00 be tantamount to an expression that the charge by New Mexico optometrists was too high? We submit that it would be so.

This, of course, is pure speculation, and the record before this Court contains no facts in this regard. We make this argument only to emphasize and to illustrate appellants' belief that they are entitled to protection against the previous restraint imposed on them in this case. In view of the nature of newspaper publication and broadcasting and the reliance on advertising revenues, appellants submit that foreclosing them from disseminating advertising is as odious a restraint under the Fourteenth Amendment as a discriminatory tax.

C. The enjoining of appellants from disseminating price advertising in interstate commerce is an unreasonable and arbitrary exercise of New Mexico's power to regulate intrastate activities and constitutes a denial of Due Process in violation of the Fourteenth Amendment.

Appellants submit that the action of New Mexico deprives them of their property without due process of law and in violation of the Fourteenth Amendment in still another respect. As this Court expressed in *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934):

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means

> selected shall have a real and substantial relation to the objects sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Section 67-7-13 N.M.S.A., 1953, as here applied, does not meet this test. New Mexico claims a legitimate interest in protecting its residents' eyesight. But this interest cannot justify its regulation of appellants to the extent that they are precluded from carrying in interstate commerce price advertising of an optometrist resident and practicing in a neighboring state. See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346 (1922).[21]

IV

New Mexico's preventing appellant Head from publishing price advertising by a Texas optometrist deprives her of her right to engage in interstate commerce and as such deprives her of her privileges and immunities as a citizen of the United States.

Appellant Head, an individual, publishes the Hobbs Flare, which has interstate circulation. She has been prevented from publishing price advertising of an optometrist residing and practicing in Texas. In publishing her paper and Roberts' advertisements, appellant Head clearly was

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[21] Moreover, New Mexico has apparently not sought to enjoin publishers of newspapers and operators of radio stations who may publish and broadcast in Texas and whose circulation and broadcast coverage may include New Mexico from disseminating Roberts' price advertising. The record is silent on this point. To the extent, however, that New Mexico may not have proceeded against any out-of-state media disseminating price information in New Mexico, New Mexico is discriminating against appellants in an unwarranted manner. *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927). Compare *State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013 (1931) aff'd 285 U. S. 105 (1932).

engaged in interstate commerce. We submit that as a citizen of the United States she has the right to engage in this commerce and New Mexico's interference with this right deprives her of her privileges and immunities as a United States citizen in violation of the Fourteenth amendment.[22] As was stated in *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891), "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States . . ."

Yet, although no reasonable basis exists for denying her privilege of engaging in such interstate commerce, appellant Head may now engage in such commerce only under the cloud of being found in contempt of the New Mexico District Court by which she has been enjoined. This denial of her rights violates the protections afforded her by Fourteenth Amendment and must fall. Compare *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Edwards* v. *California*, 314 U.S. 160 (1941).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of New Mexico should be reversed and the injunction against appellants dissolved and the action dismissed on the merits.

Dated: February 6, 1963

Respectfully submitted,

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Counsel for Appellants

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[22] Appellant Permian is a corporation. As such it is not a "citizen" within the privileges and immunities clause of the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936); *Hague* v. *C.I.O.*, 307 U. S. 496, 514 (1939).

APPENDIX A

Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation:

"67-7-13. Offenses. Penalties. Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than $50.00 nor more than $200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed by the president and secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."

APPENDIX B

Relevant sections of the Communications Act of 1934, as amended, Title 47, U. S. C. (1958):

"Sec. 151. Purposes of chapter: Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, * * * there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.".

"Sec. 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; * * *

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. * * *"

"Sec. 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

* * *

(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals,

pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * *

(e) 'Interstate communication' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia,

* * *

(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

"Sec. 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State,

Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

"Sec. 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

* * *

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs,

transmissions of energy, communications, or signals as it may deem desirable; —

* * *

(4) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals of the United States as the Commission finds qualified * * *;"

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

"Sec. 307. Licenses; allocation of facilities; terms; renewals

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities

as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years * * *"

"Sec. 317. Announcement of payment for broadcast—Disclosure of person furnishing.

(a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: * * *"

"Sec. 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

"Sec. 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."